REMARKS

Applicants respectfully request entry of the remarks submitted herein. Claims 1-7 and 9-31 are currently pending. Reconsideration of the pending application is respectfully requested.

The 35 U.S.C. §103 Rejections

Claims 1-4, 6, 9-15, 18-23, 25, 27 and 29-31 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Sarneel (US 2002/0037351; "Sarneel 02") in view of Takashima (US 2001/0055638) and Roberts (US Patent No. 4,103,038); claim 5 stands rejected under 35 U.S.C. §103(a) as being unpatentable over "Sarneel 02", Takashima, Roberts and further in view of Gisaw et al. (US Patent No. 6,558,730); claims 6, 7 and 24 stand rejected under 35 U.S.C. §103(a) as being unpatentable over "Sarneel 02", Takashima, Roberts and in further view of Sarneel et al. (WO 04/084640; "Sarneel 04"); and claims 11, 16, 17, 26 and 28 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Sarneel (US 6,663,909; "Sarneel 909"), Takashima and Roberts.

Applicants note that claims 1 and 11 are independent claims, and are rejected over either "Sarneel 02" or "Sarneel 909" in view of Takashima and Roberts. Since "Sarneel 909" is the issued patent that matured from the "Sarneel 02" application, the arguments below refer but apply equally to "Sarneel 909" (the citations refer to "Sarneel 02"). In addition, the arguments below focus on the non-obviousness of independent claims 1 and 11 over the cited references; however, the absence of specific references to dependent claims is not an indication or admission of the obviousness or unpatentability of any of the dependent claims. The rejections of all the claims are traversed in their entirety.

According to the Examiner, at the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Sarneel, Takashima, and Roberts before him or her to include whey protein as Takashima, as a complete or partial substitute for the egg-containing composition in Sarneel because, as disclosed in Roberts, substituting out the egg for whey protein helps to lower cholesterol content of food product and, further, whey protein helps

to maintain the swollen state of the baked good and helps to prevent baking shrinkage (OA at pages 2 - 3).

As indicated by the Examiner, "Sarneel 02" does not disclose whey protein (OA at page 2). "Sarneel 02" discloses using a composition that includes untreated (i.e., non-chlorinated) flour and starch n-alkenyl succinate instead of chlorinated flour and egg in bakery products (see, for example, paragraphs [0029] and [0046]). "Sarneel 02" discloses proteins in the context of flour, which is obtained from grain (e.g., wheat). These proteins are quite different from the whey proteins required by the present claims, which are obtained from milk.

Takashima discloses the combination of starch and pregelatinized starch along with a thermocoagulation protein such as whey protein (see, for example, paragraph [0013] of Takashima). Takashima does not disclose starch n-octenyl succinate. Roberts discloses using whey proteins along with lecithin as an emulsifier and a particular ratio of polyunsaturated / saturated fats as a replacement for egg whites (see, for example, column 3, lines 47-56). Roberts does not even mention starch n-octenyl succinate.

Combining "Sarneel 02", which discloses using starch n-alkenyl succinate but not whey proteins, with Takashima and Roberts, which each disclose using whey proteins but not starch n-alkenyl succinate, is a classic case of hindsight. The *KSR* Court, quoting *Graham* (383 U.S., at 36), stated that the "Supreme Court has 'warn[ed] against 'temptation to read into the prior art the teachings of the invention in issue' and instruct[ed] courts to 'guard against slipping into the use of hindsight'." (*KSR International Co. v. Teleflex Inc.*, 127 S. Ct., at 1742 (2007)). Simply because "Sarneel 02" discloses starch n-alkenyl succinate and Takashima and Roberts disclose whey proteins does not make the pending claims obvious.

Significantly, the Supreme Court stated that "rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." (*KSR* at 1727, quoting *In re Kahn*, 441 F.3d 997, 988 (Fed. Cir. 2006)) and urged that "this analysis should be made explicit" (*KSR* at 1742). In the present case, however, the Examiner simply asserted that it would be obvious to one of skill in the art, having the three cited references in front of them, to arrive at the claimed invention. However, this is not the standard for obviousness. In fact, there are thousands of publications in this art, and the Examiner has not explained why one of skill in

the art would select, out of thousands of publication, the particular three references cited against the pending claims, especially since the purpose of using whey protein in Takashima and Roberts is different from its purpose in the claimed composition.

The present rejection does not support the legal conclusion of obviousness of the present claims. Accordingly, in view of the remarks herein, Applicants respectfully request that the rejection of the pending claims under 35 U.S.C. §103 be withdrawn.

The Double Patenting Rejections

Claims 11 and 26 stand rejected on the grounds of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 4, 8 and 17 of U.S. Patent No. 6,663,909 in view of US 2001/0055638.

Applicants respectfully requests that this rejection be held in abeyance until allowable subject matter is found. At that time, Applicants will consider submitting an appropriate Terminal Disclaimer.

CONCLUSION

Applicants respectfully request that claims 1-7 and 9-31 be allowed. If a telephone call to the undersigned would expedite prosecution, the Examiner is encouraged to do so. Please apply any charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

/July 27, 2011/

Date:_____

/M. Angela Parsons/

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